Wong Koon Seng v Rahman Hydraulic Tin Bhd & Ors

HIGH COURT (KUALA LUMPUR) — ORIGINATING MOTION NO R2–25–90 OF 2002
FAIZA TAMBY CHIK J
28 OCTOBER 2002

Administrative Law — *Remedies — Certiorari — Mandamus — Refusal by special administrators to accept applicant's offer for purchase of assets — Special administrators appointed under Pengurusan Danaharta Nasional Bhd Act — Whether special administrators were public authorities within scope of O 53 r 2(4) of the Rules of the High Court 1980 — Whether decisions of special administrators had character of public law — Whether decisions of special administrators were subject to judicial review*

Civil Procedure — *Time — Certiorari — Application for judicial review — Ex parte application for leave not filed within time — Whether application was regular — Rules of the High Court 1980 O 53 r 3(6)*

Public Authorities — *Remedies — Certiorari — Mandamus — Refusal by special administrators to accept applicant's offer for purchase of assets — Special administrators appointed under Pengurusan Danaharta Nasional Bhd Act — Special administrators deemed the agents of first respondent pursuant to s 32 of the Pengurusan Danaharta Nasional Bhd Act — First respondent was a private entity — Whether special administrators were public authorities within scope of O 53 r 2(4) of the Rules of the High Court 1980*

The borrower ('first respondent') was granted credit facilities by a syndication of lenders ('the lenders') pursuant to a facility agreement. The first respondent had defaulted under the said credit facilities and pursuant to the Pengurusan Danaharta Nasional Bhd Act 1998 ('the Danaharta Act') and the vesting certificate, all the rights, assets and interests of the lenders in connection with the first respondent's said credit facilities and security documents were acquired by and vested into Pengurusan Danaharta Nasional Bhd ('Danaharta'). Consequent upon such vesting, Danaharta appointed the second to fourth respondents as special administrators of the first respondent. Thereafter, the second to fourth respondents invited potential investors to attend a briefing on the procedure for submission of their proposals to restructure and/or acquire the first respondent's assets ('the first invitation'). The first respondent's assets to be acquired included, inter alia, its mining lease and related assets ('the assets concerned'). Following the first invitation, various interested parties, including the applicant, attended the scheduled briefing. At the said briefing, copies of the information memorandum dated 1 March 2002 ('the first MOI') were given to various interested parties, including the applicant. The first MOI expressly stated that the first MOI did not constitute an offer by the second to fourth respondents and the second to fourth respondents were not bound to accept any of the proposals submitted. On the closing date, a total of six proposals were received by the second to fourth respondents offering to purchase a variety of

the first respondent's assets. The applicant's proposal dated 18 March 2002 was offered for the acquisition of the assets concerned with an offer price of RM6,003,000 ('the applicant's offer'). After due deliberation, the third respondent on behalf of the first respondent rejected the applicant's officer and returned therewith the applicant's bankers cheque for the sum of RM120,060. The reason for the rejection was that the applicant's offer was too low for the assets concerned. The applicant then requested the second to fourth respondents to reconsider their decision to reject its offer. The second to fourth respondents were however not prepared to do so, despite the applicant's meeting with them and with Danaharta on various occasions. Subsequent to the aforesaid rejection of the applicant's offer, a further briefing was fixed whereby the applicant and others were invited to submit fresh offers for the acquisition of the assets concerned. The said briefing was however cancelled. Thereafter, an advertisement was placed in the newspapers by the second to fourth respondents wherein all interested parties were invited to submit their offers for the acquisition of the first respondent's operating tin mine with a right to enter, occupy and mine on an 'as is where is basis'. It was not disputed that these assets were the same as the assets concerned. In addition to the aforesaid advertisement, the second to fourth respondents had by their letter of 5 July 2002 extended their invitation to the applicant to submit his fresh offer for the acquisition of the assets concerned. On 18 July 2002, a total of three proposals were received by the second to fourth respondents including a proposal from Fook Wan Thye Credit & Leasing Sdn Bhd with an offer price of RM14,000,300 ('Fook Wan Thye's offer'). The applicant did not submit any offer. The other two offers made were for RM12,000,888.99 and RM11,500,000 respectively. The second to fourth respondents accepted the Fook Wan Thye's proposal. This was the applicant's application for: (a) an order of certiorari to quash the respondents' rejection of the applicant's offer; (b) an order of certiorari to quash the respondents' acceptance of Fook Wan Thye's offer; (c) an order of mandamus that the mining lease and related assets of the first respondent be awarded to the applicant pursuant to the terms of the first MOI; or (d) an order of mandamus that the respondents reconsider the applicant's offer.

Held, dismissing the application:

(1) This application was irregular because the ex parte application for leave for the same was not filed within the time prescribed under O 53 r 3(6) of the Rules of the High Court 1980 ('the RHC'). The applicant's offer was rejected by the second to fourth respondents by a letter dated 30 April 2002. Accordingly, the application herein ought to have been filed on or before 9 June 2002 instead of 9 August 2002 as was done in the instant case. In the absence of any court order allowing for extension of time, the application herein was misconceived and ought to be dismissed outright (see

p 107E–G); *Mersing Omnibus Co Sdn Bhd v Minister of Labour and Manpower & Anor* [1983] 2 MLJ 54 and *Ravindran v Malaysian Examinations Council* [1984] 1 MLJ 168 followed. A

(2) The first respondent (which was an 'affected person' pursuant to s 21(a) of the Danaharta Act), was a private entity and not a public authority as it was a limited company duly incorporated under the provisions of the Companies Act 1965. Since the second to fourth respondents were deemed to be acting as the agents of the first respondent pursuant to s 32 of the Danaharta Act, they were agents of a private entity. Accordingly, the second to fourth respondents were not 'public authority' within the scope of O 53 r 2(4) of the RHC (see p 108D). B C

(3) Although the second to fourth respondents had been appointed under the provisions of the Danaharta Act and thereby had the powers specified in the Second Schedule thereto, their decisions in rejecting the applicant's offer and accepting Fook Wan Thye's offer were commercial decisions taken for and on behalf of the first respondent as a private or 'business' entity. Those decisions were made in the field of 'private law' in accordance with the spirit of 'freedom to contract' and did not have any character of public law. Therefore, their decisions were not and should not be subject to judicial review (see p 108E–G). D E

(4) The application for an order of mandamus to compel the second to fourth respondents to award the mining lease and related assets to the applicant was clearly an attempt by the applicant to enforce his purported contractual or 'private right' against the respondents. If the applicant maintained that there was a contract, then his claim ought to have been for damages for breach of contract. The applicant's prayers for a mandamus and certiorari were in essence prayers for specific performance and an injunction, which remedies were available in private law. Judicial review applied to matters relating to public law and should not be made available for enforcement of private rights. Accordingly, the application herein was misconceived and ought to be dismissed by this court (see p 110A–C). F G

(5) The filing of this application contravened s 39A of the Danaharta Act as it sought to 'obstruct or hinder' the exercise of the right and power conferred on the second to fourth respondents as special administrators. Further, the court was unable to grant the orders as prayed because an order of court quashing the second to fourth respondents' decisions would certainly 'restrain or affect action taken by ... the special administrators', which was expressly prohibited by s 72(b) of the Danaharta Act. Also, an order of mandamus to compel the second to fourth respondents to award the mining lease and related assets to the applicant would contravene s 72(c) of the Danaharta Act. Accordingly, the prayers sought for in this application were absolutely barred by s 72 of the H I

Danaharta Act (see pp 111I–112B, F); *Tan Sri Dato' Tajuddin Ramli v Pengurusan Danaharta Nasional Bhd & Ors* [2002] 5 MLJ 720 followed.

(6) This application was mala fide and hindered the ongoing disposal of assets exercise undertaken by the second to fourth respondents. This would defeat the intention of Parliament which had decreed that Danaharta and the special administrators must be permitted to realize the borrowers' assets without hindrance and express statutory provisions were enacted towards this effect. This application was exactly the kind of proceedings that the Danaharta Act sought to bar. The success of Danaharta depended on speed. Danaharta and the special administrators were given wide powers as Parliament recognized the need for special powers in the interest of the public (see p 112F–H).

[Bahasa Malaysia summary

Peminjam ('responden pertama') diberikan kemudahan kredit oleh satu sindiket pemberi pinjaman ('pemberi-pemberi pinjaman') menurut satu perjanjian kemudahan kredit. Responden pertama telah ingkar di bawah kemudahan kredit tersebut dan menurut Akta Pengurusan Danaharta Nasional Bhd 1998 ('Akta Danaharta') dan sijil letakhak, segala hak, aset dan kepentingan pemberi-pemberi pinjaman berhubung dengan kemudahan kredit dan dokumen cagaran responden pertama diperolehi oleh dan diletakhak dalam Pengurusan Danaharta Nasional Bhd ('Danaharta'). Berikutan letakhak demikian, Danaharta melantik responden kedua hingga keempat sebagai pentadbir khas responden pertama. Selepas itu, responden kedua hingga keempat menjemput bakal pelabur untuk menghadiri satu taklimat mengenai prosedur penyerahan cadangan penyusunan semula dan/atau memperolehi aset responden pertama ('jemputan pertama'). Aset responden pertama yang hendak diperolehi termasuk, antara lain, pajakan perlombongan dan aset-aset yang berkaitan dengannya ('aset-aset berkaitan tersebut'). Susulan dari jemputan pertama, pelbagai pihak yang berkepentingan, termasuk pemohon, telah menghadiri taklimat yang dijadualkan. Di taklimat tersebut, salinan-salinan memorandum maklumat bertarikh 1 Mac 2002 ('MM pertama') diberikan kepada pelbagai pihak yang berkepentingan, termasuk pemohon. MM pertama jelas menyatakan bahawa MM pertama tidak membentuk satu tawaran oleh responden kedua hingga keempat dan responden kedua hingga keempat tidak diikat untuk menerima mana-mana cadangan yang diserahkan. Pada tarikh tutup, sebanyak enam cadangan diterima oleh responden kedua hingga keempat yang menawarkan untuk membeli pelbagai aset responden pertama. Tawaran pemohon bertarikh 18 Mac 2002 ditawarkan untuk pemerolehan aset tersebut dengan satu harga tawaran sebanyak RM6,003,000 ('tawaran pemohon'). Selepas pertimbangan yang wajar, responden ketiga bagi pihak responden

pertama menolak tawaran pemohon dan memulangkan kembali cek pemohon yang berjumlah RM120,060. Alasan penolakan tersebut adalah kerana tawaran pemohon adalah terlalu rendah untuk aset tersebut. Pemohon kemudiannya meminta responden kedua hingga keempat agar menimbangkan semula keputusan mereka untuk menolak tawarannya. Walau bagaimanapun, responden kedua hingga keempat tidak bersedia untuk berbuat demikian, meskipun pemohon telah berjumpa dengan mereka dan Danaharta beberapa kali. Berikutan penolakan tawaran pemohon, taklimat lanjut ditetapkan di mana pemohon dan orang lain dijemput untuk menyerahkan tawaran baru bagi pemerolehan aset tersebut. Namun demikian taklimat tersebut dibatalkan. Selepas itu, satu iklan diletakkan di dalam akhbar-akhbar oleh responden kedua hingga keempat dalam mana semua pihak yang berkepentingan dijemput untuk menyerahkan tawaran mereka bagi pemerolehan lombong timah responden pertama yang aktif dengan hak untuk memasuki, menduduki dan melombong pada dasar 'as is where is'. Ia tidak dipertikaikan bahawa aset-aset ini adalah sama dengan aset tersebut. Sebagai tambahan kepada iklan tersebut, responden kedua hingga keempat telah menerusi surat mereka bertarikh 5 Julai 2002 melanjutkan jemputan mereka kepada pemohon supaya menyerahkan tawaran baru bagi memperolehi aset tersebut. Pada 18 Julai 2002, sebanyak tiga cadangan diterima oleh responden kedua hingga keempat termasuk satu cadangan dari Fook Wan Thye Credit & Leasing Sdn Bhd dengan harga tawaran sebanyak RM14,000,300 ('tawaran Fook Wan Thye'). Pemohon tidak menyerahkan apa-apa tawaran. Dua tawaran yang lain dibuat untuk jumlah RM12,000,888.99 dan RM11,500,000 masing-masing. Responden kedua hingga keempat telah menerima tawaran Fook Wan Thye. Ini merupakan permohonan pemohon untuk: (a) satu perintah certiorari untuk membatalkan penolakan responden ke atas tawaran pemohon; (b) satu perintah certiorari untuk membatalkan penerimaan tawaran Fook Wan Thye oleh responden-responden; (c) satu perintah mandamus bahawa pajakan perlombongan dan aset responden pertama tersebut diawardkan kepada pemohon menurut terma MM pertama; atau (d) satu perintah mandamus bahawa responden-responden menimbangkan semula tawaran pemohon.

Diputuskan, menolak permohonan tersebut:

(1) Permohonan ini di luar aturan kerana permohonan ex parte untuk kebenaran yang sama tidak difailkan dalam tempoh masa yang ditetapkan di bawah A 53 k 3(6) Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT'). Tawaran pemohon ditolak oleh responden kedua hingga keempat melalui sepucuk surat bertarikh 30 April 2002. Oleh itu, permohonan di sini sepatutnya difailkan pada atau sebelum 9 Jun 2002 dan bukannya pada 9 Ogos 2002 seperti yang dilakukan dalam kes ini. Dalam ketiadaan apa-apa perintah mahkamah yang membenarkan perlanjutan masa, permohonan di sini adalah salah faham dan seharusnya ditolak sekaligus (lihat

A ms 107E–G); *Mersing Omnibus Co Sdn Bhd v Minister of Labour and Manpower & Anor* [1983] 2 MLJ 54 dan *Ravindran v Malaysian Examinations Council* [1984] 1 MLJ 168 diikut.

(2) Responden pertama (yang merupakan 'affected person' menurut s 21(a) Akta Danaharta), adalah satu entiti persendirian dan B bukan pihak berkuasa awam kerana ia adalah sebuah syarikat berhad yang diperbadankan dengan wajar di bawah peruntukan Akta Syarikat 1965. Oleh kerana responden kedua hingga keempat dianggap bertindak sebagai ejen responden pertama menurut s 32 Akta Danaharta, mereka merupakan ejen-ejen entiti persendirian. Oleh itu, responden kedua hingga keempat C bukanlah 'public authority' dalam lingkungan A 53 k 2(4) KMT (lihat ms 108D).

(3) Walaupun responden kedua hingga keempat telah dilantik di bawah peruntukan Akta Danaharta dan dengan itu mempunyai kuasa yang dinyatakan dalam Jadual Kedua Akta Danaharta, D keputusan mereka dalam menolak tawaran pemohon dan menerima tawaran Fook Wan Thye merupakan keputusan perniagaan yang dibuat untuk dan bagi pihak responden pertama sebagai satu entiti persendirian atau 'perniagaan'. Keputusan tersebut dibuat di dalam bidang 'private law' menurut semangat 'freedom to contract' dan tidak memiliki apa-apa sifat undang- E undang awam. Oleh yang demikian, keputusan mereka bukan dan tidak seharusnya tertakluk kepada kajian semula kehakiman (lihat ms 108E–G).

(4) Permohonan untuk satu perintah mandamus bagi mewajibkan responden kedua hingga keempat mengaward pajakan F perlombongan dan aset tersebut kepada pemohon jelas merupakan satu percubaan oleh pemohon untuk menguatkuasa hak kontraktual atau 'private right' beliau terhadap responden-responden. Sekiranya pemohon berkeras bahawa wujudnya kontrak, maka tuntutannya seharusnya dibuat untuk ganti rugi atas kemungkiran kontrak. Permohonan pemohon untuk mandamus G dan certiorari pada dasarnya adalah permohonan untuk pelaksanaan spesifik dan injunksi, yang mana remedinya terletak dalam undang-undang persendirian. Kajian semula kehakiman terpakai kepada perkara yang berhubung dengan undang-undang awam dan tidak harus tersedia untuk penguatkuasaan persendirian. Justeru itu, permohonan di sini adalah salah faham H dan harus ditolak oleh mahkamah ini (lihat ms 110A–C).

(5) Pemfailan permohonan ini melanggar s 39A Akta Danaharta kerana ia bertujuan 'obstruct or hinder' pelaksanaan hak dan kuasa yang dikurniakan ke atas responden kedua hingga keempat sebagai pentadbir khas. Seterusnya, mahkamah tidak dapat memberi I perintah seperti yang dipohon kerana satu perintah mahkamah yang membatalkan keputusan responden kedua hingga keempat sudah tentu akan 'restrain or affect action taken by ... the special

administrators', yang dilarang secara nyata oleh s 72(b) Akta Danaharta. Juga, satu perintah mandamus untuk mewajibkan responden kedua hingga keempat supaya mengaward pajakan perlombongan dan aset tersebut kepada pemohon akan melanggar s 72(c) Akta Danaharta. Justeru itu, rayuan-rayuan yang dibuat dalam permohonan ini dihalang secara mutlak oleh s 72 Akta Danaharta (lihat ms 111I–112B, F); *Tan Sri Dato' Tajuddin Ramly v Pengurusan Danaharta Sdn Bhd & Ors* [2002] 5 MLJ 720 diikut.

(6) Permohonan ini dibuat secara mala fide dan merintangi pelaksanaan pelupusan aset yang masih dijalankan oleh responden kedua hingga keempat. Ini akan menewaskan hasrat Parlimen yang telah memerintahkan bahawa Danaharta dan pentadbir khas mesti dibenarkan merealisasikan aset peminjam-peminjam tanpa gangguan dan peruntukan berkanun nyata digubalkan untuk tujuan ini. Permohonan inilah yang merupakan jenis prosiding yang ingin dihalang oleh Akta Danaharta. Kejayaan Danaharta bergantung pada kepantasan. Danaharta dan pentadbir khas diberi kuasa luas oleh kerana Parlimen mengiktirafkan keperluan untuk kuasa khusus demi kepentingan masyarakat awam (lihat ms 112F–H).]

Notes

For cases on certiorari, remedies, see 10 *Mallal's Digest* (4th Ed, 1999 Reissue) paras 1575–1577.

For cases on time, certiorari, see 2 *Mallal's Digest* (4th Ed, 2001 Reissue) para 6323.

Cases referred to

Kekatong Sdn Bhd v Bumiputra-Commerce Bank Bhd & Anor [2002] 6 MLJ 186 (refd)

Mersing Omnibus Co Sdn Bhd v Minister of Labour and Manpower & Anor [1983] 2 MLJ 54 (folld)

R v Panel on Take-overs and Mergers, ex p Datafin Plc & Anor (Norton Opax Plc and another intervening) [1987] 1 All ER 564 (refd)

Ravindran v Malaysian Examinations Council [1984] 1 MLJ 168 (folld)

Tan Sri Dato' Tajuddin Ramli v Pengurusan Danaharta Nasional Bhd & Ors [2002] 5 MLJ 720 (folld)

Woon Kwok Cheng v Tan Sri Datuk Chang Min Tat & Ors [1993] MLJU 551 (refd)

Ganda Oil Industries Sdn Bhd & Ors v Kuala Lumpur Commodity Exchange & Anor [1988] 1 MLJ 174 (refd)

Legislation referred to

Pengurusan Danaharta Nasional Bhd Act 1998 ss 21(a), 30, 31, 32, 39A, 72

Rules of the High Court 1980 O 53 r 2(4), O 53 r 3(6)

M Puravalen (*Jeev Anand* and *Mazlan Mohd Nor* with him) (*How Zul & Low*) for the applicant.

Dato' Dr Cyrus Das (*Yoong Sin Min* and *Lau Kee Sern* with him) (*Shook Lin & Bok*) for the respondents.

Faiza Tamby Chik J: The brief chronology of events of the instant case is as follows. The borrower was granted credit facilities of RM250m by a syndication of lenders comprising MBf Finance Berhad and MBf Leasing Sdn Bhd ('the lenders') pursuant to a facility agreement dated 24 June 1997. The borrower had defaulted under the said credit facilities. Pursuant to the Pengurusan Danaharta Nasional Bhd Act 1998 ('the Danaharta Act') and the vesting certificate (exh 'WLW–1' to respondent's Wong affidavit — p 51), all the rights, assets and interests of the lenders in connection with the borrower's said credit facilities and security documents were acquired by and vested into Pengurusan Danaharta Nasional Bhd ('Danaharta') as of 24 April 2000. Consequent upon such vesting, Danaharta appointed the second to fourth respondents as special administrators of the borrower on 16 June 2000. The second to fourth respondents in their duties as special administrators of the borrower had examined the assets of the borrower and considered how to deal with the disposal of the assets of the borrower to maximize the returns and to restructure the borrower company. On or about 26 February 2002, by various press articles, the second to fourth respondents invited all potential investors to attend a briefing scheduled for 1 March 2002 on the procedure for submission of their proposals to restructure and/or acquire the borrower's assets ('the first invitation') (exh 'WLW–2' to respondent's Wong affidavit at p 56). The borrower's assets to be acquired included, inter alia, the borrower's mining lease and related assets ('the assets concerned'). Following from the first invitation, various interested parties including the applicant attended the scheduled briefing on 1 March 2002. At the said briefing, copies of the information memorandum dated 1 March 2002 ('the first MOI') (exh 'WLW–3' to the respondent's Wong affidavit — p 62) were given to various interested parties, including the applicant at their request and upon them signing the confidentiality agreement (exh 'WLW–4' to the respondent's Wong affidavit at p 312).

Pursuant to the express terms of the first MOI, it is provided, inter alia, that:

(a) the first MOI does not constitute an offer by the second to fourth respondents (see cover p 62 and p 70 of exh 'WLW–3');

(b) the various dates as set out therein, except for the closing date for submission which has been fixed for 18 March 2002 ('the closing date'), are tentative in nature and may be altered by the second to fourth respondents after consultation with Danaharta (see p 71 of exh 'WLW–3');

(c) the second to fourth respondents are not bound to accept any of the proposals submitted (see p 84 of exh 'WLW–3'); and

(d) the second to fourth respondents are under no obligation to provide any explanation for their decisions and such decisions shall be final (see p 84 of exh 'WLW–3').

On the closing date, a total of six proposals were received by the second to fourth respondents offering to purchase a variety of the borrower's assets. The applicant's proposal dated 18 March 2002 was offered for the acquisition of the assets concerned with an offer price of RM6,003,000 ('the applicant's offer') (exh 'WLW–5' of respondent's Wong affidavit — p 314). It is expressly provided at para 2 of the applicant's offer that 'in the event that this offer is accepted by the special administrator ...', which presupposes an acceptance by the respondents is required. After due deliberation and by a letter dated 30 April 2002 (exh 'WLW–6' of respondent's Wong affidavit — p 319), the third respondent on behalf of the borrower rejected the applicant's officer and returned therewith the applicant's unnegotiated Bankers Cheque No RHB 072964 for the sum of RM120,060. The reason for the rejection was that the respondents' felt that the applicant's offer made was too low for the assets concerned. The applicant had requested the second to fourth respondents to reconsider their decision to reject this offer. The second to fourth respondents were however not prepared to do so, despite the applicant's meeting with them and with Danaharta on various occasions. Subsequent to the aforesaid rejection of the applicant's offer, a further briefing was fixed for 8 May 2002 whereby the applicant and others were invited to submit fresh offers for the acquisition of the assets concerned. The said briefing was however cancelled on 8 May 2002. Thereafter, an advertisement was placed in the newspapers on 5 July 2002 (exh 'WLW–8' to respondent's Wong affidavit at p 323) by the second to fourth respondents wherein all interested parties were invited to submit their offers for the acquisition of the first respondent's operating tin mine with a right to enter, occupy and mine on an 'as is where is basis' ('the second invitation'). It is not disputed that these assets are the same as the assets concerned (see exh 'WLW–9' for information memorandum dated 5 July 2002 ('the second MOI' at p 325). In addition to the aforesaid advertisement published on 5 July 2002, the second to fourth respondents had by their letter of 5 July 2002 (exh 'WLW–10' to respondent's Wong affidavit at p 405) extended their invitation to the applicant to submit his fresh offer for the acquisition of the assets concerned. On 18 July 2002, a total of three proposals were received by the second to fourth respondents including a proposal dated 18 July 2002 from Fook Wan Thye Credit & Leasing Sdn Bhd with an offer price of RM14,000,300 ('Fook Wan Thye's offer') (exh WLW–11' at p 408). The applicant did not submit any offer. The other two offers made were for RM12,000,888.99 and RM11,500,000 respectively. Contrast this to the applicant's initial offer of RM6,003,000. By a letter dated 30 July 2002 (exh 'WLW–12' to respondent's Wong affidavit at p 412), the second to fourth respondents accepted the Fook Wan Thye's proposal. Pursuant to the Kuala Lumpur Stock Exchange Listing Requirements, an announcement was made on 1 August 2002 by the second to fourth respondents to the Kuala Lumpur Stock Exchange on the second to fourth respondents' acceptance of the Fook Wan Thye's offer (exh 'WLW–14' at p 419). The applicant does not dispute any of the above.

Pursuant to the court order dated 22 August 2002, the application herein was filed seeking for the following reliefs:

(a) a certiorari order to quash the respondents' rejection of the applicant's offer;

(b) a certiorari order to quash the respondents' acceptance of Fook Wan Thye's offer;

(c) a mandamus order that the mining lease and related assets of the borrower be awarded to the applicant pursuant to the terms of the memorandum of information dated 1 March 2002; or

(d) a mandamus order that the respondents do reconsider the applicant's offer once more.

The issues involved in the present application are as follows:

(a) whether the application herein is regular in view of the fact that the ex parte application for leave for the same was not filed within time prescribed under O 53 r 3(6) of the Rules of the High Court 1980;

(b) whether the second to fourth respondents' being special administrators appointed under the provisions of the Danaharta Act are 'public authorities' within the scope of O 53 r 2(4) of the Rules of the High Court 1980 ('the RHC');

(c) whether this court can grant the various orders sought for in the said application in the light of ss 39A and 72 of the Danaharta Act: and

(d) whether the facts of the present case entitle the applicant to the remedies sought for.

I am of the opinion that the application herein is irregular in view of the fact that the application for leave for the same was not filed within the time prescribed under O 53 r 3(6) of the RHC. Order 53 r 3(6) of the RHC provides:

> An application for judicial review shall be made promptly and in any event within 40 days from the date when grounds for the application first arose or when the decision is first communicated to the applicant provided that the court may, upon application and if it considers that there is a good reason for doing so, extend the period of 40 days.

The applicant's offer was rejected by the second to fourth respondents by a letter dated 30 April 2002 ('exh WLW–6' at p 319 of respondent's Wong affidavit). Accordingly, the application herein ought to have been filed on or before 9 June 2002. The fact that it was only filed on 9 August 2002 clearly shows that there was a delay of two calendar months. In the absence of any court order allowing for extension of time, the application herein is misconceived and ought to be dismissed outright by this court. The authorities for the above proposition are found from the following cases:

(i) Federal Court decision of *Mersing Omnibus Co Sdn Bhd v Minister of Labour and Manpower & Anor* [1983] 2 MLJ 54 — filing within time is essential;

(ii) Federal Court decision of *Ravindran v Malaysian Examinations Council* [1984] 1 MLJ 168 — in absence of leave, no application properly before court.

It is clear from the above cases that the court has no jurisdiction to hear an application for judicial review if the same has been filed out of time even if

leave to apply for the same has been so granted by the court. In the premises, I am of the view that the court has no jurisdiction to hear the application herein as it was filed without a court order for extension of time and would therefore be hereby dismissed with costs.

Can the second to fourth respondents be properly classified as 'public authority' within the ambit of O 53 of the RHC? I think the second to fourth respondents' being special administrators appointed under the provisions of Danaharta Act are not 'public authority' within the scope of O 53 r 2(4) of the RHC. Order 53 r 2(4) of the RHC provides: 'Any person who is adversely affected by the decision of any public authority shall be entitled to make the application.'

Section 32 of the Danaharta Act clearly provides: 'The special administrator shall, in the administration of the affected person, be deemed to be acting as the agent of the affected person.'

'Affected person' is defined by s 21(a) of the Danaharta Act to mean 'any company owing a duty or liability under a credit facility to the Corporation (Danaharta) or any subsidiary of the Corporation (Danaharta), whether present, future, vested or contingent'.

In the instant case, the first respondent is an 'affected person' and is a limited company duly incorporated under the provisions of the Companies Act 1965. It is therefore a private entity and not a public authority. It follows that the second to fourth respondents, are deemed in law as agents of the first respondent, are therefore agents of a private entity. This fact was acknowledged by the applicant when he made the borrower company the first respondent in his application, as he acknowledged that the second to fourth respondents could only enter a contract with him through the first respondent. In the instant case, although the second to fourth respondents have been appointed under the provisions of the Danaharta Act and thereby shall have the powers as specified in the Second Schedule thereto, their decisions in rejecting the applicant's offer and accepting Fook Wan Thye's offer are commercial decisions taken for and on behalf of the first respondent as a private entity, or more particularly, a 'business' entity. These decisions were made in the field of 'private law' in accordance with the spirit of 'freedom to contract' and certainly do not have any character of public law. In the premises, I am of the view that the respondents' decisions are not and should not be subject to judicial review. In the English Court of Appeal decision of *R v Panel on Take-overs and Mergers, ex-parte Datafin Plc & Anor (Norton Opax Plc and another intervening)* [1987] 1 All ER 564, at p 583, Lloyd LJ said:

> So I turn to counsel for the panel's more technical argument. He starts with the speech of Lord Diplock in *Council of Civil Service Unions v Minister for the Civil Service* [1984] 3 All ER 935 at pp 949–950, [1985] AC 374 at p 409:
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> > 'For a decision to be susceptible to judicial review the decision-maker must be empowered by public law (and not merely, as in arbitration, by agreement between private parties) to make decisions that, if validly made, will lead to administrative action or abstention from action by an authority endowed by law with executive powers, which have one or other of the consequences mentioned in the preceding paragraph. The ultimate source of the decision-making power is nearly always nowadays a statute or

> subordinate legislation made under the statute; but in the absence of any statute regulating the subject matter of the decision the source of the decision-making power may still be the common law itself, ie that part of the common law that is given by lawyers the label of 'the prerogative'. Where this is the source of decision-making power, the power is confined to executive officers of central as distinct from local government and in constitutional practice is generally exercised by those holding ministerial rank.'

On the basis of that speech, and other cases to which he referred us, counsel for the panel argues: (i) that the sole test whether the body of persons is subject to judicial review is the source of its power; and (ii) that there has been no case where that source has been other than legislation, including subordinate legislation, or the prerogative.

I do not agree that the source of the power is the sole test whether a body is subject to judicial review, nor do I so read Lord Diplock's speech. Of course the source of the power will often, perhaps usually, be decisive. If the source of power is a statute, or subordinate legislation under a statute, then clearly the body in question will be subject to judicial review. If, at the other end of the scale, the source of power is contractual, as in the case of private arbitration, then clearly the arbitrator is not subject to judicial review: see *R v Disputes Committee of the National Joint Council for the Craft of Dental Technicians, ex p Neate* [1953] 1 All ER 327, [1953] 1 QB 704.

But in between these extremes there is an area in which it is helpful to look not just at the source of the power but at the nature of the power. If the body in question is exercising public functions, or if the exercise of its functions have public law consequences, then that may, as counsel for the applicants submitted, be sufficient to bring the body within the reach of judicial review. It may be said that to refer to 'public law' in this context is to beg the question. But I do not think it does. The essential distinction, which runs through all the cases to which we referred, is between a domestic or private tribunal on the one hand and a body of persons who are under some public duty on the other. Thus in *R v Criminal Injuries Compensation Board, ex p Lain* [1967] 2 All ER 770 at p 778, [1967] 2 QB 864 Lord Parker CJ, after tracing the development of certiorari from its earliest days, said:

> 'The only constant limits throughout were that the body concerned was under a duty to act judicially and that it was performing a public duty. Private or domestic tribunals have always been outside the scope of certiorari since their authority is derived solely from contract, that is from the agreement of the parties concerned.'

To the same effect is a passage from a speech of Lord Parker CJ in an earlier case, to which we were not, I think, referred, namely *R v Industrial Court, ex p ASSET* [1964] 3 All ER 130 at p 136, [1965)]1 QB 377 at p 389:

> It has been urged on us that really this arbitral tribunal is not a private arbitral tribunal, but that, in effect, it is undertaking a public duty or a quasi-public duty and, as such, is amenable to an order of mandamus. For my part, I am quite unable to come to that conclusion. It is abundantly clear that they had no duty to undertake the reference. If they had refused to undertake the reference they could not be compelled to do so. I do not think that the position is in any way different once they have undertaken the reference. They are clearly doing something which they were not under any public duty to do, and, in those circumstances, I see no jurisdiction in this court to issue an order of mandamus to the Industrial Court.

In addition, I think in seeking a court order to compel the second to fourth respondents to award the mining lease and related assets of the first respondent to the applicant pursuant to the terms of the first MOI (see prayer (c) of encl 1), the applicant is clearly attempting to impose and enforce his purported contractual or 'private right' against the respondents. If the applicant maintains there is a contract, then his claim ought to have been for damages for breach of contract filed against the respondents. The applicant's prayers for a mandamus and certiorari are in essence prayers for specific performance and an injunction, remedies which are available in private law. The applicant can only rely on private law remedies in respect of the alleged infringement of private rights. Judicial review ought only to apply to matters relating to public law and ought not be made available for enforcement of private rights (see *Woon Kwok Cheng v Tan Sri Datuk Chang Min Tat & Ors* [1993] MLJU 551; *Ganda Oil Industries Sdn Bhd & Ors v Kuala Lumpur Commodity Exchange & Anor* [1988] 1 MLJ 174). I therefore conclude that the application herein is misconceived and ought to be dismissed by this court and I hereby do so.

It is observed that the second to fourth respondents have expressly made known to the applicant the following terms:

(a) the first MOI does not constitute an offer by the second to fourth respondents;

(b) the various dates as set out therein, except for the closing date for submission which has been fixed for 18 March 2002 ('the closing date') are tentative in nature and may be altered by second to fourth respondents after consultation with Danaharta;

(c) the second to fourth respondents are not bound to accept any of the proposals submitted; and

(d) the second to fourth respondents are under no obligation to provide any explanation for their decisions and as such the decisions shall be final.

The applicant's offer acknowledged the above and although it was the only offer for the assets concerned, for a contract to take place, it had to be accepted by the second to fourth respondents. No such acceptance took place and the applicant cannot show a clear and unequivocal acceptance by the respondents. The subsequent offer prices for the acquisition of the assets concerned received by the second to the fourth respondents are much higher (in fact, more than double) than that of the applicant's offer. This vindicated the second to fourth respondents' decision not to accept the applicant's offer as they had held the view that his offer was too low. Subsequent to the rejection of the applicant's offer, the applicant had been invited to tender his fresh offer to acquire the assets concerned but the applicant chose not to avail himself of such opportunity. The second to fourth respondents would have been grossly negligent to the first respondent's shareholders and creditors, including Danaharta, if they accepted the offer for the assets concerned at such gross undervalue. Based on the above, the second to fourth respondents were correct in rejecting the applicant's offer and thereafter conducting fresh invitations for the acquisition of the assets concerned. It is entirely logical and reasonable for

A the second to fourth respondents to accept Fook Wan Thye Sdn Bhd's offer of RM14,000,300. The applicant's unreasonable refusal to partake in the subsequent exercise clearly demonstrates his lack of bona fides. The only basis for the applicant clinging on to the argument that the second to fourth respondents were obliged to accept his offer was the issue of the return of his deposit. The deposit, as stated by affidavit, was to have been collected B by the applicant at the second to fourth respondent's office as requested by him. The applicant deliberately refused to so collect the same and is now unconscionably relying on his own inaction to justify this application. The court ought not to condone such action. There is no basis in fact and in law to quash the second to fourth respondents' decisions and to further compel C the second to fourth respondents to accept or reconsider the application offer which has been validly rejected. The Danaharta Act provides special laws for the acquisition by Danaharta of liabilities and assets and managing and disposing them as well as for appointment of special administrators with special powers. The intentions of the Danaharta Act as seen in its preamble are, inter alia, as follows:

D (a) to assist financial institutions by removing impaired assets, to assist the business sector by dealing expeditiously with financially distressed enterprises and to promote the revitalisation of the nation's economy by injecting liquidity into the financial system, such goals to be achieved through the acquisition, management, financing and disposition of assets and liabilities;

E (b) to promptly, efficiently and economically implement the acquisition, management, financing and disposition of assets and liabilities;

(c) to expeditiously appoint special administrators to administer and manage persons whose assets or liabilities have been so acquired.

F The special administrators once appointed by Danaharta, shall take over the management and control of the first respondent company (see s 31 of the Danaharta Act). The special administrators' powers are set out in s 30 and in the Second Schedule of the Danaharta Act. In this regard, s 39A(1) of the Danaharta Act provides that no person shall obstruct or hinder the exercise of any right or power by a special administrator. Section 72 of the G Danaharta Act further provides that notwithstanding any law, an order of court cannot be granted which:

(a) stays, restrains or affects the powers of, inter alia, the special administrators;

(b) stays, restrains or affects any action taken or proposed to be taken by, H inter alia, the special administrators;

(c) compels the special administrators to do or perform any act.

The application herein seeks for orders of court to quash the second to fourth respondents' decision in rejecting the applicant's offer and the second to fourth respondents' decision in accepting Fook Wan Thye's offer with further I prayers for mandamus orders for the second to fourth respondents' to accept or reconsider the applicant's offer. Firstly, I am of the opinion that the filing of the application herein is itself clearly in contravention of s 39A of the

Danaharta Act as it seeks to 'obstruct or hinder' the exercise of the right and power conferred on the second to fourth respondents as special administrators under the Danaharta Act. Secondly, the court is unable to grant the orders as prayed by reason of the prohibition of s 72 of the Danaharta Act. An order of court in quashing the second to fourth respondents' decisions will certainly 'restrain or affect action taken' which is expressly prohibited by s 72(b) of the Danaharta Act. Also, a mandamus order compelling the second to fourth respondents to award the mining lease and related assets to the applicant will obviously contravene s 72(c) of the Danaharta Act. The provision of s 72 has been previously considered by the courts. Firstly, there is the recent High Court decision of *Tan Sri Dato' Tajuddin Ramli v Pengurusan Danaharta Nasional Bhd & Ors* [2002] 5 MLJ 720. This involves a case where the plaintiff there sought an injunction against Danaharta. Section 72 of the Danaharta Act was considered extensively and it was held that s 72 precludes the court from granting any restraining order against Danaharta. Vincent Ng J commented that (at pp 741–742):

> It is incontrovertible that s 72 constituted a caveat against the granting of a restraining order directed at the courts ... . Thus, in the present case I would hold that this court is precluded by the expressed crystal clear provision in s 72 from granting the injunction or restraining order sought by the plaintiff.

Although the above case involves an injunction application, the principles therein are applicable as s 72 bars court orders granting not only injunctions but also certiorari and mandamus orders as well. In *Kekatong Sdn Bhd v Bumiputra-Commerce Bank Bhd & Anor* [2002] 6 MLJ 186, it was held that s 72 of the Danaharta Act prohibits the granting of an injunction to restrain the sale of charged land by Danaharta Urus (at p 190):

> The wordings of s 72 are very clear and contain no ambiguity as to its meaning and intention. In the absence of any ambiguity, it is incumbent upon this court to give it its literal meaning.

In the premises, I am of the view that the prayers sought for in the application are absolutely barred by s 72 of the Danaharta Act.

This application is clearly mala fides and it hinders the ongoing disposal of assets exercise by the second to fourth respondents. This defeats the intention of Parliament which has decreed that Danaharta and the special administrators must be permitted to realize the borrowers' assets without hindrance and had passed very clear express statutory provisions towards this effect. The application herein is exactly the kind of proceedings which the Danaharta Act seeks to bar. It must be noted that the success of the asset management company depends on speed. They were given wide powers because of the public benefit and Parliament recognized the need for special powers in the public interest and for the public good.

The application is hereby dismissed with costs.

Application dismissed.

Reported by Lim Lee Na